Together We Stand Women's Guild Day Care Center *and* District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO. Case 29-CA-7824

June 5, 1981

DECISION AND ORDER

On November 24, 1980, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.[1]

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Together We Stand Women's Guild Day Care Center, Brooklyn, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

[2] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

We note additionally that, to the extent that Respondent's exceptions assert the existence of facts that are not a part of the formal record herein, we are unable to consider such evidence absent a showing that it was newly discovered or not previously available. See Sec. 102.48(b) and (d)(1) of the Board's Rules and Regulations. That showing has not been made here.

To the extent that a portion of the exceptions may be considered a motion to reopen the record, that motion is hereby denied. See Sec. 102.48(d)(1) of the Board's Rules.

[3] Member Jenkins would award interest on backpay in accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT interrogate or poll our employees concerning their membership in or support for District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO, or any other union.

WE WILL NOT discriminatorily discharge, demote, or deny educational opportunities to our employees because of their union activities, membership, or support.

WE WILL NOT fail and refuse to bargain with the Union in good faith concerning wages, hours, and other terms and conditions of employment by unilaterally changing the working conditions of our employees and WE WILL rescind the personnel practices and procedures which were announced on February 26, 1980.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to form, join, or assist District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection or to refrain from any or all such activities.

WE WILL offer Carol Black, Dewey Stovall, and Arlene Henry immediate and full reinstatement to their former positions, or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and WE WILL permit Arlene Henry to participate as an acting group teacher under the study plan, and WE WILL make all of them whole for

any losses suffered by reason of our unlawful conduct, with interest.

TOGETHER WE STAND WOMEN'S GUILD DAY CARE CENTER

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in New York, New York, on September 29 and 30, 1980, based on a charge filed by District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO, herein called the Union, on March 3, 1980, and a complaint issued on behalf of the National Labor Relations Board, herein called the Board, by the Regional Director of Region 29 of the Board, on April 22, 1980. The complaint alleges that Together We Stand Women's Guild Day Care Center,[1] herein called Respondent, or the Center, has violated Section 8(a)(1), (3), and (5) of the Act. Respondent's timely filed answer, as amended at hearing, denies the commission of any unfair labor practices.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and to cross-examine witnesses, to argue orally, and to file briefs. No briefs were filed.

Based upon the entire record herein, including my careful observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is engaged, in the borough of Brooklyn, city and state of New York, in the operation of a day care center. It is funded by the Federal and state governments through the Agency for Child Development of the city of New York. Jurisdiction is not in issue. The complaint alleges, and Respondent admits, facts sufficient to establish that Respondent meets the Board's standards for the assertion of jurisdiction over day care enterprises.[2] I therefore find and conclude that, at all times material herein, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that the Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

[1] The name of Respondent appears as amended at hearing.

[2] See *Salt & Pepper Nursery School & Kindergarten No. 2*, 222 NLRB 1295 (1976). See also *Young Women's Christian Association of Metropolitan Chicago*, 235 NLRB 788 (1978), and other cases cited therein.

II. THE UNFAIR LABOR PRACTICES

A. *Background and Union Activity*

Respondent was founded in about 1972; it provides day care for the children of approximately 100 families.

During the fall of 1979, there were a number of changes in the leadership at Respondent's facility. Shirley Payton, one of its founders, had been its executive director from 1972 until August 1979. She was replaced in that capacity by Sylvia Stovall. Stovall remained until December and she was, in turn, replaced by Vivian Best. Ruth A. Glover became chairperson of Respondent's board of directors in January 1980, succeeding Milton Stroud. At that same time, Shirley Payton reappeared as Respondent's representative for labor relations purposes, an admitted agent.

The current union activity began in late October 1979 when the Union's representative, Willie Golphin, received a call from Dewey Stovall, an assistant teacher, asking that he arrange a meeting with the Center's staff. Golphin held a meeting, with the apparent knowledge and permission of the Center's management, in the staff lounge on November 1. Over the course of about a hour and a half, he met with 12 employees and secured signed union authorization cards from 10 of them. Golphin gave additional literature and cards to Dewey Stovall, who passed out cards to the remaining employees, asked them to sign, and discussed the Union with virtually all of the employees. Shirley Payton learned of this union activity from some of the employees during November or December. Best and Glover learned of the activity soon after they came on board; Best admitted hearing from employees that Dewey Stovall had distributed union cards. The Union sent Respondent a demand for recognition on December 6; the Center did not respond.

On January 18, 1980,[3] a petition for representation election was filed by the Union and a meeting, for the purpose of agreeing to the terms of an election, was held on January 31, 1980. Payton, Glover, and Best represented Respondent. In the course of this meeting, Golphin heard Payton say that she did not believe that unions were good for day care centers because they placed restrictions on the employees who could be hired and prevented the centers from hiring the people they believed were best suited for particular jobs. He also heard Payton say that she knew that Dewey Stovall was instrumental in bringing the Union in.[4] Respondent and the Union agreed to a consent election.

The representation election in Case 29-RC-2945 was conducted on February 26, 1980, and a majority of the employees in an appropriate unit[5] voted in favor of

[3] All dates hereinafter are 1980 unless otherwise specified.

[4] Golphin's testimony is uncontradicted.

[5] The unit for collective bargaining, admitted by Respondent to constitute a unit appropriate for the purposes of collective-bargaining within the meaning of Section 9(b) of the Act, includes:

> All full-time and regular part-time group teachers, assistant group teachers, teaching aides, bookkeepers, assistant bookkeepers, cooks, helpers and maintenance employees employed by Respondent at its Lexington Avenue center, exclusive of all other employees, including the executive director, educational director, assistant director, guards and supervisors as defined in Section 2(11) of the Act.

having the Union as their collective-bargaining representative. The Union was so certified on March 13, 1980. Respondent does not now contest the Union's representative status.

B. *Interrogation and Polling of Employees*

Glover's response, on learning of the union activity from Vivian Best and some of the employees, was to call a meeting for January 28, 1980. According to Glover's own testimony, she told the staff "some different things about the union," including what the dues would be for different categories of employees and said, "if the union will come into the center you will have to follow rules and regulations." According to Glover, "there was more flexibility without the union." Two pieces of paper were then passed around for the employees to sign. One was an attendance roster; the other asked the employees to state whether or not they wanted the Union, and why. A couple of days before this meeting, Vivian Best had taken a similar paper around to some of the employees in the Center and asked them to sign whether or not they wanted a union and why. Some signed, some asked if they had to and were told that they did not. At the meeting of January 28, according to the uncontradicted testimony of Arlene Henry, Glover said that she had sent a paper around "and that when the Board requested you to do something you do it or else it's insubordination." Glover continued, telling the employees that the Union had asked her to get this information for the meeting scheduled for the following Thursday. Arlene Henry and an employee named McKinney voiced objections and questions concerning their obligation to sign Glover's questionnaire. To these objections, Glover stated, "You don't have to sign the paper if you don't want to, but you probably won't get the Union."

Following the meeting, Shirley Payton called about four or five employees and asked them how they felt about the Union. Among those called was assistant bookkeeper, Carol Black. Black told Payton that she was for anything that would make conditions at the Center better and was told by Payton that, if Payton had felt that the Union were any good, she would have brought it in while she was the director.

"[T]the basic premises in situations involving the questioning of employees by their employer about union activities is that such questions are inherently coercive by their very nature." *P.B.&S. Chemical Co.*, 224 NLRB 1, 2 (1976). As the Board more recently stated, "Inquiries . . . probing into employees' union sentiments . . . reasonably tend to coerce employees in the exercise of their Section 7 rights . . . even in the absence of threats of reprisal or promises of benefits. The type of questioning at issue conveys an employer's displeasure with employees' union activity and thereby discourages such activity in the future." *PPG Industries, Inc., Lexington Plant, Fiber Glass Division*, 251 NLRB 1146 (1980). The questioning of employees involved in the instant case clearly comes within these cogently stated principles. Indeed, the interrogation here took on a particularly coercive cast in view of Glover's implied threat of stricter work rules, her reference to the refusal to comply with the directives of Center's board of directors (to sign such a questionniare) as insubordination, her unsupported and unsupportable claim to employees that refusal to sign her questionnaire would prevent them from becoming represented by the Union, and by the fact that the interrogation did not take place only once, but was repeated by Respondent's entire management team, Glover, Best, and Payton. Moreover, I note that the record contains no evidence of any legitimate purpose for conducting such a poll. Accordingly, I find that by the interrogation and polling its employees concerning their union membership, activities, and desires, Respondent has violated Section 8(a)(1) of the Act.

C. *Violations of Section 8(a)(3) of the Act*

1. Changes in schedules and rules

In the course of the January 28 meeting, Glover announced that there would be changes in the teachers' work schedules and that, thereafter, the schedules would be changed every 2 months. On February 1, Best implemented the change in the work schedules. At the same time, there were changes in the teachers' room assignments. Respondent also changed the policy regarding who would look after the children, and where, after 5 o'clock in the evening. Previously, at 5 p.m., the teachers in the upstairs classrooms brought their children down to the first floor; after February 1, all teachers were told they had to remain in their classrooms, with the children, until 6 p.m. At 6 p.m. they were permitted to bring any remaining children downstairs. Finally, at this time, the staff was told that they were not permitted time off from work to go to school.

The General Counsel alleges that the foregoing changes, particularly the new work schedules and the policy of rotation of those schedules every 2 months, was retaliation by Respondent for the employees' union activities in violation of Section 8(a)(3) of the Act. Respondent offered no explanation for these changes which, as will be shown *infra*, adversely affected a number of employees, particularly those who were active in, or were known to be sympathetic toward, the Union. Moreover, it appears that these changes, first announced at the January 28 meeting where the coercive interrogation took place, were the fulfillment of the implied threat by Glover that, if there were a union at the Center, there would be less flexibility and more rigid adherence to rules and procedures. Accordingly, I find that, by announcing and implementing changes in the schedules and work rules, Respondent has retaliated against its employees for engaging in union activity, and has thereby violated Section 8(a)(3) and (1) of the Act.

2. Carol Black

Carol Black was an accounting student at Manhattan Community College. She was hired by Shirley Payton, then Respondent's director, in July 1979 as an assistant bookkeeper working about 15 hours per week. She worked with and under a full-time bookkeeper, Aleathia Harvin.

In October 1979, Sylvia Stovall, who had become the Center's director, told Black that she would have to take

a test, administered by the Agency for Child Development (ACD), in order to be verified as assistant bookkeeper. Nothing was said to her as to what effect the test results would have on her job. The first time, she took the test intended for bookkeepers and failed. In November she took the proper exam for assistant bookkeepers. She failed that one also. In discussions with both Sylvia Stovall and Harvin following her unsuccessful efforts she was told that her failure would have no impact on her job; Stovall had been so instructed by representatives of ACD. She took the test again in late November and, once again, she failed. Following this second unsuccessful effort she again asked both Stovall and Harvin whether her failure would affect her job. She was told not to worry, that she could take the test as often as she wanted.

Black's employment earned credits for her academic program and, during November, Sylvia Stovall was required to grade Black's work for the school. Stovall gave her an "A" at the end of that grading period, grading her on her work habits.

On January 31, 1980, Black reported for work at 3:30, signed in, sat down, and began her duties. Vivian Best approached her, said nothing, but dropped a letter on her desk. The letter was her termination notice and it referred to "several irregularities" in her work. It also implied that ACD required her discharge because she had failed the assistant bookkeepers' exam three times. No one had ever discussed any irregularities with her or complained to her about any irregularities in the handling of the vouchers from the U.S. Department of Agriculture on which she worked.

Respondent claimed that Black was discharged because an audit conducted by the U.S. Department of Agriculture (USDA) revealed Black's deficiencies in the handling of the USDA vouchers and because of her repeated failure of the assistant bookkeepers' exam. Vivian Best claimed that the failure to pass the exam and be verified by ACD as an assistant bookkeeper mandated her discharge. She admitted, however, that Black was supposed to be paid out of the funding for substitute employees and that, if she were, the failure to be verified would not have required her discharge.

Respondent produced, in response to the General Counsel's subpena, an audit report from the USDA. That report, the General Counsel's Exhibit 13, indicates that the audit commenced on February 15 and was completed on February 27, 1980, both dates after Black's discharge. It covered the period of July through December 1979. There was no direct reference to Carol Black. In general, the auditor found the "accounting systems and internal controls" adequate "to safeguard its assets [and] check the accuracy and reliability of accounting data . . . ." There was some criticism of the handling of checks on the USDA cash account, i.e., too many voided checks, a void check not so recorded, checks used out of sequence and two checks signed by an "unauthorized signor." The record does not establish these matters as being within Black's area of responsibility.

The General Counsel contends, and I agree, that the record evidence establishes that Respondent discharged Carol Black because of her union activities and sympathies. Black had signed a card when requested to do so by Dewey Stovall. She was interrogated by Shirley Payton only 3 days before her discharge and told Payton that she was in favor of anything which would improve conditions at the Center. Moreover, Respondent's explanations for Black's termination are clearly pretexual and their pretexual nature supports the inference that the real reason for her termination was an unlawful one. *Shattuck Denn Mining Corporation* v. *N.L.R.B.*, 362 F.2d 466 (9th Cir. 1966). Thus, the record does not support Respondent's statement that Black's failure of the verification exam required that she be discharged. Moreover, 2 full months had passed since Black's second failure of the assistant bookkeeper exam she was not warned that failure to take it again and pass it would result in her discharge. Her failure of that exam was tolerated until knowledge of her union activity became clear.

Respondent's evidence concerning the USDA audit similarly does not support the action it took against Carol Black. The record evidence does not indicate that, prior to Black's discharge, any of her work had been audited or that any adverse report regarding her work had come to Respondent's attention.

Moreover, the record reflects Respondent's animus toward the employees' union activity, as demonstrated by both lawful and unlawful statements and actions.

Accordingly, I find that Carol Black was discharged on January 31 because of her union membership, support, and sympathies, and that that discharge violated Section 8(a)(3) and (1) of the Act.

3. Arlene Henry

Arlene Henry began working at the Center as a substitute teacher in October 1973. Subsequently, her status was changed to that of permanent assistant teacher. As the job title implied, the assistant teacher worked under a group teacher in the classroom carrying out the functions of the day care center, helping to meet the needs of the children. In March 1979, the group teacher under whom Henry worked left. Without any formal promotion, Henry, who had become the only teacher remaining in the classroom, assumed the group teacher's responsibilities. Henry left the Center in December 1978 on maternity leave and returned in late April 1979. On her return she was once again responsible, without any official notification, for the overall running of the classroom. In August 1979, Sylvia Stovall told Henry that she was the acting group teacher and as such, would be receiving a $2-per-day pay differential. From then on, Henry received that differential. She satisfactorily performed the duties of the acting group teacher.

ACD provided for a category of teacher known as group teacher on the study plan. This permitted a teacher, who could not be a group teacher because he or she did not have a Bachelor's degree, but who lacked only 32 or less credits toward such a degree, to function as a group teacher if that teacher was working toward the degree.[6] In April 1979, Henry requested to go on the

[6] Although the record is less than clear, it appears that this category also provided for payment of tuition.

study plan. Then Director Payton told her that another teacher was still on it but that she would check into it and get back to her. In July, according to Henry, Payton told her that the other teacher had completed the study plan and the way was clear for Henry to go on it. Henry was told to register for school. According to Payton, Henry was also told that participation in the study plan would require the approval of the Center's board of directors.

In September 1979 Henry gave Stovall a letter formally requesting participation in the study plan, which request Stovall took to the Center's board of directors. It was approved by Milton Stroud, Glover's predecessor as chairperson of that Board, on September 12, 1979. It was then too late for Henry to start in the September term, but ACD representatives told Stovall that Henry could start school in February, could continue to get the $2 differential until then, and should furnish a letter from the college indicating that she was starting.

On February 1, following the change in classroom assignments, Henry discovered that there was now a group teacher in her classroom on a permanent basis. Though never formally informed, Henry assumed that she was no longer the acting group teacher.

On February 4, Henry started school, working to complete her Bachelor's degree requirements. She was not on any study plan. On the following day, Henry brought the bursar's receipt to Vivian Best and asked if she should give that receipt to Best or send it directly to ACD. Best told Henry that she knew nothing about it and Henry told her of her understandings with Stovall, Payton, and the ACD representative that she would be on the study plan. Best replied that ACD did not decide who participated, the Center's board of directors made that decision. When Henry told Best that the board had approved, Best said she knew nothing of it.

On February 9, Henry gave Best a letter directed to the board of directors, Best and Payton asking why she had been disqualified from the study plan. Best brought this letter to Glover's attention. According to Henry, she received no response. Glover, however, recalled telling Henry, at some date not specified in this record, that she would check into Henry's assertions that she had been recommended and approved for the position of group teacher on the study plan. Finding nothing in the minutes of the Board meetings on this subject, Glover subsequently told Henry that she should have gotten the approval in writing. These latter statements, it appears, were made in the staff meeting of February 26, held immediately after the election.

The General Counsel contends that both the February 1 demotion of Arlene Henry from acting group teacher to assistant group teacher and the subsequent withdrawal of the approval for Henry's participation in the study plan were motivated by the union activity in which Henry and the other employees engaged. The General Counsel, I believe, has established a *prima facie* case that such were the facts. Thus, the employees had engaged in union activity, the employer had both knowledge of and animus toward that activity, the particular employee had engaged in union activity and had, in fact, spoken out in the meeting of January 28, to object to Respondent's unlawful interrogation, and the change of classroom assignments which adversely affected Henry was announced at that January 28 meeting and implemented only 2 days later. That change, to place a group teacher in the classroom with her, had the effect of both demoting her to assistant teacher and, apparently, making her ineligible to participate as an acting group teacher on the study plan. It maybe that this change was properly motivated by legitimate economic or educational concern. However, on the state of this record, there is no explanation for this change and, in light of the General Counsel's *prima facie* case the obligation to provide such an explanation rests on the Respondent. See *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).[7] Accordingly, I am constrained to conclude that Arlene Henry was demoted from the position of acting group teacher and was thereafter denied participation in the study plan because of her union activity and that of her fellow employees, in violation of Section 8(a)(3) and (1) of the Act.

4. Dewey Stovall

Dewey Stovall[8] began working at the Center in March 1979 as an assistant teacher. He had been hired by Shirley Payton. As previously noted, Dewey was the leading proponent of the Union and his union activity was known to Respondent's management.

In September 1979, Dewey enrolled in the New York School of Television. He attended class three nights per week, Monday, Wednesday, and Friday, beginning at 6 p.m. As that had been his normal quitting time, he required and received permission from Stovall to leave work one-half hour early on those days in order to get to class on time.

When Vivian Best became the Center's director, Dewey told her of the arrangement with Sylvia Stovall which permitted his attendance at school and asked Best whether this would cause any problems. She said that it would not. Several days later, however, Best came into Dewey's classroom and told him that he would not be able to go to school, that there was a new rule, adopted by the Board, which would preclude his leaving early. On the following day, Best told Dewey that he would have to submit a letter to the Board, that there were no documents regarding his schooling in the file and no record of Stovall giving him permission to leave early. Dewey checked his personnel file and found that an earlier letter from the school, which he had given to Sylvia Stovall, was not there.[9]

On some occasions, parents were unable to pick up their children until 6 p.m. or later. When that occurred, the teachers would bring the children to the lobby. When this involved children left in Dewey's care, he

[7] The citation to *Wright Line* assumes that there was a mixed motivation in these changes. It might as well be argued that Respondent's lack of explanation for the changes announced on January 28 indicates that there was no reason, apart from the union activity.

[8] Dewey Stovall will be referred to hereafter as Dewey, to avoid confusion with Sylvia Stovall, to whom he is not related.

[9] There is some dispute between Dewey and Best over whether Dewey had permission to search his personnel file. There is no question, however, but that the earlier correspondence from his college was not in that file.

would see that they were left with a group teacher. As of February 1, the teachers were told that they were required to remain in their classrooms, with their students, until 6 p.m. Following this directive, Dewey did not leave work until 6 p.m.

On February 25, one child remained in Dewey's classroom at 6 p.m. He brought the child downstairs, to the lobby, so that he could leave and go to class, for which he was already one-half hour late. A number of people were in the lobby, including Ida Shackley, a substitute or assistant teacher, and a board member, Daniels. In the office adjacent to the lobby, with a minimal view of that lobby through the window, were Glover and Best. Dewey put the child in Shackley's care and told her that he was leaving. The receptionist asked him if he were going to sign out and he did. As he left, Glover and Best looked out of the office and observed him leaving, but did not stop him.

When Dewey reported to work at 10 a.m. on February 26, the day of the election, Best called him into the office. She asked him why he had left a child alone and he denied doing so. She then terminated him. She would not let him go back to the classroom to get his personal belongings. He received a letter of summary dismissal stating that he was discharged for leaving a child "alone by himself."

Best and Glover testified that Dewey Stovall was discharged because he left a child unattended in the lobby. They acknowledged that the child was left with a teacher, Shackley, and a board member, Daniels. Shackley, according to Best, was a substitute teacher who had worked that day. She was there, that evening, for an interview for a full-time job. Best contended that the rule which had been instituted on February 1 required both a group teacher and an assistant teacher to remain with any children left beyond 6 o'clock and further required that the teacher of the children involved would have to stay. They further contended that the New York Health Code does not permit a child to be left without the supervision of a teacher.

The record reflects that Dewey Stovall was the first teacher to be terminated for leaving children allegedly unattended. Another teacher, who, sometime in January, had left 15 children unattended in a classroom during their rest period, was not discharged but only reprimanded. The New York City Health Code only requires that children be adequately and competently supervised.

Based on all of the foregoing, I must conclude that Respondent's discharge of Dewey Stovall on February 26 was motivated by his union activities and that any other reason asserted for that discharge was entirely pretexual. In so concluding I note the extent of Stovall's union activity, Respondent's knowledge of that activity and its animus toward it, the timing of that discharge to coincide with the election, the disparate and discriminatory denial of a scheduling accommodation so that he could further his education, the fact that the denial of such an accommodation virtually forced Stovall to make accommodations in securing other teachers to watch over the remaining child or children, the failure of Respondent to prevent Stovall from leaving when they saw him doing so, the fact that the child was not left without proper supervision, and the disparate punishment accorded to Stovall as compared to the teacher who left a much larger group of children totally unattended and yet received only a reprimand. Accordingly, I find that Respondent discharged Dewey Stovall, not for any breach of its rule regarding the care of children, but rather because of his union activities, membership, and support, and that, by such discharge, Respondent violated Section 8(a)(3) and (1) of the Act.

D. *Unilateral Action in Violation of Section 8(a)(5) of the Act*

Glover had told the employees on January 28 that they would receive new personnel practices and procedures. At a meeting held with the staff at 7 p.m. on February 26, following the representation election which, as previously noted, the Union had won, Glover gave out a new personnel practice and procedures manual, read it to the employees, and told them that these personnel practices and procedures superseded all practices and procedures which had existed previously. The new practices and procedures differ from and add new material to those which had been in effect previously. Respondent instituted these new practices and procedures without notification to or bargaining with the Union. The Union has requested Respondent to bargain with it, by letter, but has received no response.

It is axiomatic that, once a union is certified as the employees' collective-bargaining representative, an employer may not unilaterally modify wages, hours, and working conditions and that, between the election and certification, an employer takes such action at its peril. The conduct of Respondent herein, coming immediately upon the heels of the election, clearly was in derogation of its obligation to bargain with the Union and violated Section 8(a)(5) of the Act. I so find.

THE REMEDY

It having been found that Respondent has engaged in unfair labor practices in violation of Section 8(a)(1), (3), and (5) of the Act, it will be recommended that Respondent be required to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged Carol Black and Dewey Stovall, Respondent shall be required to offer them immediate and full reinstatement to their former positions or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and shall make them whole for any losses they may have suffered by reason of the discrimination against them. Similarly, it having been found that Respondent discriminatorily demoted Arlene Henry from the position of acting group teacher to that of assistant teacher and discriminatorily denied her the opportunity to participate as an acting group teacher under the study plan, Respondent shall be required to offer her immediate and full reinstatement to her former position or, if that job no longer exist, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, and

shall make her whole for any losses she may have suffered by reason of the discrimLnation against her. All backpay due under the terms of this Order shall be computed, with interest, in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[10]

CONCLUSIONS OF LAW

1. By interrogating and polling its employees concerning their union membership, sympathies, and desires, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

2. By discharging Carol Black and Dewey Stovall and by demoting Arlene Henry and denying her participation as an acting group teacher under the study plan, because of their union activities and in order to discourage membership in and support for the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

3. By instituting new work schedules and policies because of the union activities of its employees and in order to discourage membership in and support for the Union, Respondent has violated Section 8(a)(3) and (1) of the Act.

4. All full-time and regular part-time group teachers, assistant group teachers, teaching aides, bookkeepers, assistant bookkeepers, cooks, helpers and maintenence employees employed by Respondent at its Lexington Avenue center, exclusive of all other employees, including the executive director, educational director, assistant director, guards and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

5. At all times material herein the Union has been, and is now, the exclusive representative of all of the employees in the aforesaid unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

6. By unilaterally announcing and implementing new personnel practices and procedures without notification to or bargaining with the Union, Respondent has bargained in bad faith and has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[11]

The Respondent, Together We Stand Women's Guild Day Care Center, Brooklyn, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating or polling its employees concerning their union membership, activities, or desires.

(b) Discriminatorily discharging, demoting, or denying educational opportunities to its employees or discriminatorily implementing restrictive rules and policies because of the employees' union activity and in order to discourage membership in District Council 1707, Community and Social Agency Employees Union, American Federation of State, County and Municipal Employees, AFL-CIO, or any other union.

(c) Failing and refusing to bargain with the Union in good faith regarding wages, hours, and other terms and conditions of employment, by unilaterally changing work conditions.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which it is found will effectuate the policies of the Act:

(a) Offer Carol Black, Dewey Stovall, and Arlene Henry immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and permit Arlene Henry to participate as an acting group teacher under the study plan, and make them all whole for any losses they may have suffered by reason of the unlawful conduct involved herein, in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Rescind the personnel practices and procedures which were announced and implemented as of February 26, 1980.

(c) Post at its place of business in the borough of Brooklyn and city and State of New York, copies of the attached notice marked "Appendix."[12] Copies of said notices, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

---

[10] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[11] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[12] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."